

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK D. ANDERSON,

Defendant-Appellant.

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UNPUBLISHED

January 3, 2003

No. 233783

Wayne Circuit Court

LC No. 99-011012-01

Before: O’Connell, P.J., and White and B. B. MacKenzie\*, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, carjacking, MCL 750.529a, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to serve concurrent prison terms of fifteen to thirty years for the robbery conviction and two to four years for the assault conviction, to be served consecutive to a term of fifteen to thirty years for the carjacking conviction, which in turn is to be served consecutive to a mandatory two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant’s convictions arise from his unsuccessful attempt to force a chauffeur at gunpoint to withdraw funds from an automatic teller machine (ATM) using his client’s credit card, followed by a carjacking and confrontation with the owner of the credit card. Defendant was linked to the crime by the chauffeur’s identification of him at a lineup and in court, still photographs taken from a videotape at the ATM, his possession of the stolen credit card at the time of his subsequent arrest, and his confession.

On October 16, 1999, Kim Ketchpaw, a limousine driver, transported his client, Joseph Louis Barrow, to two nightclubs in Detroit. At the second nightclub, Barrow gave Ketchpaw a credit card, told Ketchpaw his personal identification number (PIN), and asked him to withdraw \$500 from an ATM. At approximately 4:00 a.m., Ketchpaw went to a nearby bank and attempted to make the withdrawal from an outdoor ATM while remaining inside the limousine. Another car pulled into the lot and stopped, but Ketchpaw did not see anyone get out of the car. According to Ketchpaw, shortly thereafter, defendant came up to the driver’s side window from behind the car, grabbed Ketchpaw’s arm, put a handgun to the back of his head and said, “Do what I tell you or I’ll shoot you,” and “Give me five hundred dollars.” Ketchpaw twice

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

attempted to withdraw the money from the ATM, but the requests were unsuccessful. Defendant then got into the limousine and demanded that Ketchpaw tell him the PIN, following which defendant unsuccessfully attempted the transaction. At defendant's order, Ketchpaw attempted to contact Barrow by calling him and calling the nightclub, but was unsuccessful. Defendant then took Ketchpaw's wallet and the money inside it, approximately eleven dollars. Defendant also took the credit card out of the ATM and retained it.

Defendant subsequently drove the limousine out of the parking lot, and Ketchpaw saw a white car following them. Defendant eventually drove to the nightclub and Barrow came out to the parking lot. Barrow approached the passenger side of the limousine and, when he looked to see who was driving, defendant pointed his gun at Barrow. After Barrow recited the PIN number for the credit card, defendant drove off with Ketchpaw still in the car. Defendant returned to the same bank with the ATM, got out of the limousine, and headed in the direction of the ATM. Ketchpaw then drove the limousine back to the nightclub where he met the police.

The following afternoon at approximately 2:45 p.m., Sergeant Robert Kozlowski was in an unmarked squad car, checking for stolen cars in the area of Danbury and Lantz, which is a short area that dead ends into either railroad tracks or the yard of a business. The area had three houses, two of which were abandoned. During that week, "numerous" stolen vehicles had been recovered from this specific location. Kozlowski observed a white Ford Taurus that was parked facing southbound on Danbury just north of Lantz, with two male occupants inside. He suspected that the vehicle may have been stolen and requested assistance to investigate the car. At that time, Kozlowski recalled seeing a teletype earlier that day about a white Ford Taurus that had been involved in an early morning armed robbery approximately a mile away. The marked scout car met Kozlowski in the area of Lantz and John R and, as the officers spoke, the Taurus pulled off of Danbury and proceeded westbound on Lantz. The marked unit followed and stopped the car.

Defendant was driving, but was unable to produce a driver's license, registration, or proof of insurance when requested. He supplied a receipt with a woman's name and phone number and said she was the registered owner. Defendant said that she must have reported the car stolen. Kozlowski called in a request to contact the registered owner, and, a short time later, was informed that the vehicle was stolen. Defendant was arrested for possession of a stolen motor vehicle. During the search incident to defendant's arrest, Kozlowski found Joseph Barrow's credit card in defendant's front pants pocket, as well as two other cards from a checkbook in defendant's back pocket.

On appeal, defendant argues that the trial court erred in denying his motion to suppress where the investigatory stop that led to his arrest was illegal. This Court reviews a trial court's factual findings in a suppression hearing for clear error. *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999). The trial court's application of constitutional standards, however, is not entitled to the same deference as its factual findings. *Id.*

At the evidentiary hearing, the defense challenged Sergeant Kozlowski's claim that he was aware of the robbery involving a white Ford Taurus at the time of the stop. Specifically, defense counsel challenged Kozlowski's claim that he had reviewed a teletype of the Taurus' involvement in the robbery before roll call, which he claimed occurred at 10:45 a.m. Although Kozlowski did not know when the teletype was issued, Investigator James Blanks identified the

teletype, acknowledging that it was issued at 2:02 p.m. According to Blanks, if normal police procedure were followed, the information regarding the robbery would have been disseminated at the time the complaint was received.

In denying defendant's motion to suppress, the trial court summarized the circumstances surrounding the traffic stop and concluded that Kozlowski had acted reasonably. While noting that Kozlowski had not stated a specific time when he reviewed the teletype, the court appeared to find, consistent with his preliminary complaint report, that Kozlowski was informed of the teletype after the stop when he called the station to check the status of the vehicle.

"[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Police officers may make a brief, investigatory stop if they possess "reasonable suspicion" that criminal activity is afoot. *People v Custer*, 465 Mich 319, 326-327; 630 NW2d 870 (2001). In *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001), our Supreme Court explained the requirements for a valid investigatory stop based on reasonable suspicion:

The brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a reasonably articulable suspicion that the person is engaging in criminal activity. The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. In determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or hunch, but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Although this Court has indicated that fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle than in a house, some minimum threshold of reasonable suspicion must be established to justify an investigatory stop whether a person is in a vehicle or on the street.

Further, in determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed as understood and interpreted by law enforcement officers, not legal scholars . . . . Also, common sense and everyday life experiences predominate over uncompromising standards. [Citations and internal quotation marks omitted.]

Here, Sergeant Kozlowski identified two general reasons for conducting an investigatory stop of defendant's vehicle: to investigate whether the vehicle was stolen and whether it was the vehicle involved in the earlier armed robbery. More particularly, he noted that the white Ford Taurus was in an area where "numerous" stolen cars had recently been recovered, the area was near a dead end that was not well traveled, and two of the three houses in the area were abandoned. The Taurus remained parked until the marked scout car arrived on the scene, at which point the driver pulled away. Further, Kozlowski recalled seeing a teletype at roll call indicating that a white Ford Taurus had been involved in a nearby armed robbery that morning.

Defendant contends that Kozlowski did not become aware of the teletype until after the stop was made and that the mere presence of defendant on a public street in an area known for criminal activity was insufficient to justify a *Terry* investigatory stop. Even were we to agree with defendant that Kozlowski was unaware of the teletype before the stop, we conclude that the officer had reasonable suspicion to conduct a brief investigatory stop to determine whether the vehicle driven by defendant was stolen.

An individual's presence in an area known for criminal activity, standing alone, is insufficient to support a reasonable, particularized suspicion that criminal activity is afoot. *Brown v Texas*, 443 US 47; 61 L Ed 2d 357; 99 S Ct 2637 (1979). However, a police officer is not required to ignore the relevant characteristics of an area in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Thus, the presence of an individual in an area known for criminal activity is a valid factor in conducting a *Terry* analysis. *Adams v Williams*, 407 US 143, 144; 32 L Ed 2d 612; 92 S Ct 1921 (1972). "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be the most reasonable in light of the facts known to the officer at the time." *Id.*, 407 US at 146. The *Terry* doctrine applies to investigative stops of a moving automobile. *United States v Bentley*, 29 F3d 1073, 1075 (CA 6, 1994).

Here, it was not merely defendant's presence in an area known for criminal activity that aroused Kozlowski's suspicion, but the lack of any obvious destination point in the area as well as the fact that defendant drove away as soon as the marked squad car arrived on the scene. Evasive behavior is a pertinent factor in determining reasonable suspicion. *Illinois v Wardlow*, 528 US 119, 124-125; 120 S Ct 673; 145 L Ed 2d 570 (2000).

While it is certainly true that these circumstances were equally indicative of innocent behavior, the Fourth Amendment protects only against *unreasonable* detentions. For example, in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation. The police officer saw two individuals pacing back and forth in front of a store, peering into the window and talking to each other periodically. *Terry, supra*, 392 US at 5-6. While this conduct, standing alone, was lawful, it also suggested that the individuals were casing the store for a planned robbery. The United States Supreme Court in *Terry* recognized that the officers were justified in briefly detaining the individuals to resolve the ambiguity of their conduct. *Id.*, 392 US at 30. See also *United States v Harris*, 192 F3d 580, 584-585 (CA 6, 1999).

In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way. [*Wardlow, supra*, 528 US at 126.]

See also *Oliver, supra* at 202-203. Here, given the totality of the circumstances, we agree with the trial court's conclusion that the officers acted reasonably in conducting a *Terry* stop of defendant's vehicle. In light of defendant's failure to produce a driver's license, registration, or

proof of insurance upon request, the officers were justified in detaining defendant until his status and the vehicle's status could be confirmed.<sup>1</sup> Probable cause for defendant's arrest was then established when the officers learned that the vehicle was stolen and that it had been involved in the earlier armed robbery. Accordingly, no Fourth Amendment violation has been demonstrated.

Defendant next argues that the trial court abused its discretion in denying a motion to adjourn trial to allow for an independent psychiatric evaluation of defendant in support of his defense of insanity or diminished capacity. We find no error.

The specific nature or basis of defendant's insanity/diminished capacity defense is indiscernible from his handwritten pretrial motion for forensic evaluation of criminal responsibility, from the trial transcript, or from his appeal brief. However, based on undisputed information in the presentence report, it appears that defendant's asserted insanity/diminished capacity defense would have been based solely on the effects of his long-term drug and alcohol abuse and his ingestion of cocaine and alcohol on the day of the offense. To the extent that this was the basis for the defense, and defendant has not offered this Court any other basis, we conclude that an insanity defense was unavailable in light of MCL 768.21a(2), which provides that "an individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances." Moreover, we note that the law concerning the defense of diminished capacity has changed since defendant's trial. In *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), the Michigan Supreme Court held that the insanity defense as established by statute is the sole standard for determining criminal responsibility as it relates to mental illness or retardation. Therefore, the Court abolished the use of a "diminished capacity defense" based on evidence of mental abnormalities short of legal insanity to avoid or reduce criminal responsibility by negating specific intent. Because any retrial in this case would necessarily be governed by the holding in *Carpenter*, this issue lacks merit.

Defendant next argues that insufficient evidence to support his conviction of felony firearm where no evidence was presented that the weapon possessed by defendant was a "firearm," as defined in MCL 8.3t. To determine whether the essential elements of the crime were proved beyond a reasonable doubt, this Court views the evidence in the light most favorable to the prosecution, drawing all reasonable inferences in support of the verdict. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

For purposes of the felony-firearm statute, a "firearm" is defined in MCL 8.3t as "any weapon from which a dangerous projectile may be propelled by using explosives, gas, or air as a means of propulsion," excepting certain small-caliber BB guns. Defendant argues that because no weapon was fired or recovered, the prosecution failed to establish the weapon's operability, caliber, or means of propulsion. We disagree.

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<sup>1</sup> Pursuant to MCL 257.311, a police officer has the authority to demand that a driver of a motor vehicle display his or her driver's license during the course of an investigatory stop.

Contrary to defendant's argument, operability is not an element of the offense of felony-firearm. *People v Thompson*, 189 Mich App 85, 86-87; 472 NW2d 11 (1991). See also *People v Hill*, 433 Mich 464, 477; 446 NW2d 140 (1989). Moreover, where a victim testifies that the defendant possessed what appeared to be a real gun, the defendant may be properly convicted of felony-firearm, even though the actual firearm is not offered into evidence. *People v Hayden*, 132 Mich App 273, 295-296; 348 NW2d 672 (1984). Here, victim Kim Ketchpaw testified that defendant put a handgun to Ketchpaw's head and threatened to shoot him if he did not do what he was told. Ketchpaw had a close-up view of the gun when defendant pointed it at Barrow at the nightclub. Accordingly, viewing the evidence in the light most favorable to the prosecution, we conclude that sufficient evidence was presented to sustain defendant's conviction. See *People v Davis*, 216 Mich App 47, 53-54; 549 NW2d 1 (1996); *People v Perry*, 172 Mich App 609, 622-623; 432 NW2d 377 (1988).

Defendant next argues that the trial court erred in failing to instruct the jury on the specific intent element of armed robbery, unarmed robbery, and felonious assault. Because this issue was not properly preserved for appellate review by a timely objection at trial, our review is limited to a determination whether plain error occurred. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Having reviewed the record, we find no plain error.

While we acknowledge that armed robbery, unarmed robbery, and felonious assault are specific intent offenses, we also note that the use of the term "specific intent" in instructing a jury as to these particular offenses is unnecessary as long as the instructions given adequately describe the intent required to convict a defendant of the charged crimes. *People v Peery*, 119 Mich App 207; 326 NW2d 451 (1982); *People v Mitchell*, 61 Mich App 153, 162-163; 232 NW2d 340 (1975). Here, as to the offenses of armed robbery and unarmed robbery, the trial court instructed the jury of the required showing that "at the time he took the money, the defendant intended to take it away from Kim Ketchpaw permanently." As to the offense of felonious assault, the court instructed the jury of the required showing that defendant "intended either to injure Joseph Louis Barrow, or make Joseph Louis Barrow reasonably fear an immediate battery." The instructions, when considered in their entirety, adequately described the intent required for each of the charged crimes, and thus sufficiently protected defendant's rights. See *People v Lee*, 243 Mich App 163, 168; 622 NW2d 71 (2000).

Lastly, in a supplemental pro per brief, defendant contends that his constitutional right of confrontation was infringed when the trial court ruled that the prosecution had exercised "due diligence" in attempting to locate and produce felonious assault victim Joseph Louis Barrow. We disagree.

As a preliminary matter, we note that due diligence is no longer the statutory standard for attempting to produce an endorsed res gestae witness for trial. Pursuant to the amendment of MCL 767.40a, 1986 PA 46, the appropriate standard is whether the trial court abused its discretion in excusing production of the witness. *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995). The statutory amendment replaced the prosecution's duty to produce res gestae witnesses with a continuing duty to advise the defense of all res gestae witnesses that the prosecutor intends to produce at trial, and to provide the defense with reasonable assistance in locating witnesses if the defendant requests such assistance. *Id.* at 290-291. Pursuant to MCL 767.40a(4), the prosecution may delete a witness from its witness list at any time "upon leave of the court and for good cause shown."

Here, the prosecution questioned the officer in charge about his efforts to find Barrow. Those efforts, which extended over a several month period, included checking three possible addresses (two out of state), contacting possible employers, performing a LEIN check, searching the Internet, contacting relatives in the state, and contacting the limousine service used on the night of the incident. Despite these extensive efforts, the officer was unsuccessful in locating Barrow. Although the trial court misstated the applicable standard when it found that the prosecution had exercised “due diligence,” we find that the court, in effect, allowed the prosecution to delete Barrow from its witness list for good cause under MCL 767.40a(4). Under the circumstances, no abuse of discretion has been shown. *Burwick, supra*. Moreover, to the extent that defendant asserts a violation of his right of confrontation, we note that, while Barrow was unavailable to testify regarding the felonious assault committed against him, evidence of the assault was presented through the testimony of Ketchpaw. Defendant was not denied the opportunity to confront his accuser, i.e., Ketchpaw, with respect to the crime. Thus, we find no violation of defendant’s right of confrontation.

Defendant further argues that due diligence required the prosecution to use the statutory procedure for securing the presence of out-of-state witnesses. MCL 767.91 *et seq.* We disagree. First, the due diligence standard is not applicable. Second, the case on which defendant relies was nullified by the Supreme Court. *People v Howay*, 222 Mich App 104; 564 NW2d 72 (1997), nullified 455 Mich 865 (1997). Third, the cases on which *Howay* relied indicated that the prosecution must use the statutory procedure *if the prosecution knows what court has jurisdiction*. The investigating officer explained that he could not determine the state in which Barrow could be located. The procedure for compelling a witness to attend does not help locate the witness.

Defendant further complains that the prosecutor committed prejudicial error when she stated before the jury that, with the exception of Barrow, the remaining three endorsed witnesses would be cumulative, but the witnesses were being produced at the request of the defense. Outside the presence of the jury, defense counsel complained that the prosecutor’s “gratuitous comment” gave “the jury the impression that the defendant is merely trying to prolong or delay this [proceeding].” Counsel requested a cautionary instruction be given to the jury to cure any possible prejudice. The trial court offered defense counsel the opportunity to draft a suitable cautionary instruction for the court’s consideration. Our review of the record indicates that defense counsel did not pursue the matter further. In his appeal brief, however, defendant takes a different tack, complaining that the statement was inflammatory because it discounted any benefit from securing the testimony of the victim, Joseph Barrow. Clearly, defendant is mistaken. The prosecutor expressly noted that, “*with the exception of Mr. Barrow*,” the remaining three witnesses would be cumulative. Thus, defendant’s argument is without merit.

Defendant’s supplemental brief also refers to the prosecution’s failure to disclose information about Barrow’s inability to identify defendant in a lineup. However, to the extent that this reference suggests an issue that is distinct from the stated issue, it is not properly before this Court because it is not identified in the statement of questions presented. MCR 7.212(C)(5);

*People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (2000).

Affirmed.

/s/ Peter D. O'Connell

/s/ Barbara B. MacKenzie